Supreme Court of the United States.

No. 123.—October Term, 1904.

John Rooney, Plaintiff in Error, vs. The State of North Dakota. } In error to the Supreme Court of the State of North Dakota.

[January 23d 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

This writ of error brings in question a final judgment of the Supreme Court of the State of North Dakota, affirming the judgment of an inferior court of that State, by which pursuant to the verdict of a jury the plaintiff in error John Rooney was sentenced to death for the crime of murder in the first degree.

The sole question upon which the plaintiff in error seeks the judgment of this court, and the only one that will be noticed, is whether the statute under which he was sentenced was *ex post facto* and therefore unconstitutional in its application to his case. His counsel agrees that the judgment must stand if the statute be constitutional.

Before as well as after the passage of the statute under which the sentence was pronounced the punishment prescribed by the State for murder in the first degree was death or imprisonment in the penitentiary for life. *Rev. Codes, N. D.* 1889, § 7068.

By the statutes in force at the time of the commission of the offence, August 26th 1902, as well as when the verdict of guilty was rendered, it was provided that when a judgment of death is rendered the judge must deliver to the sheriff of the county a warrant stating the conviction and judgment, and appointing a day on which the judgment is to be executed, "which must not be less than three months after the day in which judgment is entered, and not longer than six months thereafter." § 8305; that when there was no jail within the county, or whenever the officer having in charge any person under judgment of death deemed the jail of the county where the conviction was had insecure, unfit or unsafe for any cause, he could confine the convicted person in the jail of any other convenient county of the State, § 8320; that the judgment of death should be executed within the walls or yard of the jail of the county in which the conviction was had, or within some convenient enclosure within such county, § 8321; and that judgment of death must be executed by the sheriff of the county where the

conviction was had, or by his deputy, one of whom at least must be present at the execution. *Rev. Codes of N. D.* 1899, *pp.* 1622–3.

The sentence of death was pronounced March 31st 1903. Prior to that date, namely, on March 9th 1903, the Legislature—without changing the law prescribing death or imprisonment for life as the punishment for the crime of murder in the first degree—passed an act providing that all executions should take place at the penitentiary, and amending certain sections of the Revised Codes of 1899. By that act it was provided:

"§ 1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the North Dakota penitentiary, or in case of his death, inability or absence, the deputy warden, shall be the executioner; and when any person shall be sentenced, by any court of the State having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the North Dakota penitentiary at Bismarck, North Dakota, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of trustees thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view."

"§ 3. When a person is sentenced to death, all writs for the execution of the death penalty shall be directed to the sheriff by the court issuing the same, and the sheriff of the county wherein the prisoner has been convicted and sentenced shall, within the next ten days thereafter, in as private and secure a manner as possible to be done, convey the prisoner to the North Dakota penitentiary, where the said prisoner shall be received by the warden, superintendent or keeper thereof, and securely kept in close confinement until the day designated for the execution. . ."

"§ 14. That section 8305 of the Revised Codes of 1899, relating to judgment of death, warrant to execute, be amended so as to read as follows: § 8305. When the judgment of death is rendered the judge must sign and deliver to the sheriff of the county a warrant duly attested by the clerk under the seal of the court, stating the conviction and judgment, and appointing a day upon which the judgment is to be executed, which must not be less than six months after the day in which the judgment is entered, and not longer than nine months thereafter."

"§ 16. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." *Laws of N. D.* 1903, *c.* 99, *p.* 119.

By the sentence it was ordered that the accused be conveyed to the State penitentiary, "there to be kept in close confinement until October the ninth 1903," and, within an enclosure in that building to be erected for the purpose, be hung by the warden of the penitentiary, or in case of his inability to act or his absence therefrom, by the deputy warden, before the hour of sunrise on the day fixed for the execution.

It appears from the statement of the case that the statutes in force when the sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered, in these particulars:

1. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution.

2. By the later law, hanging, within an enclosure at the penitentiary by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail of the county in which the conviction occurred.

We are of opinion that in the particulars just mentioned the statute of 1903 is not repugnant to the constitutional provision declaring that no State shall pass an *ex post facto* law. It did not create a new offence nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offence. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable rather than as unfavorable to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when by the later law there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Calder* v. *Ball*, 3 *Dall.* 386, 391, *Chase, J.*; *Story's Const.* § 1345; *Cooley's Const. Lim.* *267; *Com'th* v. *Gardner*, 11 *Gray*, 443; 1 *Bishop's Crim. Law*, § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of the accused to obtain a pardon or commutation from the Governor of the State before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that

"close confinement" means "solitary confinement," and *Medley's case*, 134 *U. S.* 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required *close* confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the State, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the Supreme Court of North Dakota. *State* v. *Rooney*, 12 *N. D.* 144, 152.

We are of opinion that the law of 1903 did not alter the situation to the material disadvantage of the criminal, and, therefore, was not *ex post facto* when applied to his case in the particulars mentioned.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.